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IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 983

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

ALASKA AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Northwest Airlines, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 27, 1965.

Opinions Below

The opinion of the United States District Court for the District of Alaska is reported at 228 F. Supp. 322 and is printed as Appendix A herein. The opinion of the Court of Appeals for the Ninth Circuit is reported at 351 F. 2d 253 and is printed as Appendix B herein.

Jurisdiction

The judgment of the Court of Appeals was entered on September 27, 1965. Rehearing was denied on November 3, 1965. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

Questions Presented

The Court of Appeals for the Ninth Circuit has held invalid, under the public policy of the State of Alaska, a contractual provision exculpating from the consequences of its own negligence the operator of an airport owned and regulated by the Federal Aviation Agency under the International Aviation Facilities Act, 62 Stat. 450, 49 U.S.C. §§1151-1160. The contract in which the exculpatory provision appeared was made pursuant to a published schedule of charges filed with and approved by the Federal Aviation Agency,[1] in accordance with the International Aviation Facilities Act. The questions presented are:

1. Does not the Federal Aviation Agency have effective power to authorize the exculpatory agreement in question, notwithstanding the public policy of the State of Alaska, and the concomitant right to primary jurisdiction over challenges to the provision's validity?

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[1] The Federal Aviation Agency was the successor to the Civil Aeronautics Administration, and the FAA Administrator assumed the responsibilities of the CAA Administrator with respect to Airports administered under the International Aviation Facilities Act in the latter part of 1958. 72 Stat. 808 (1958); FAA, *First Annual Report* iii (1959).

The abbreviations "CAA" and "FAA" will be used interchangeably herein. The abbreviation "FAA" should be read as "CAA" when used in reference to the period prior to the change of the Agency's designation.

2. Under the United States Constitution, Article I, Section 8, Clause 3, the Commerce Clause, and Article VI, the Supremacy Clause, can a court, acting solely on the basis of state public policy, invalidate an exculpatory provision in a Schedule of Charges approved by a federal administrative agency pursuant to a Congressional program?

Constitutional Provisions Involved

U. S. Const., Art. I, Sec. 8, Cl. 3:

> "The Congress shall have Power . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U. S. Const., Art. VI, Cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Statutes Involved

The statutory provision primarily involved is the International Aviation Facilities Act, 62 Stat. 450 (1948), 49 U.S.C. 1151-1160, and particularly 49 U.S.C. §1159 (a):

> "(a) With regard to airport property and airway property in territory (including Alaska) outside the continental limits of the United States which he has acquired pursuant to this chapter or any other

provision of law, the Administrator is empowered and directed to do and perform by contract or otherwise, all acts and things necessary or incident to their consolidation, operation, protection, maintenance, improvement, and administration, including but not limited to the power (1) to adapt, from time to time, such properties to the needs of civil aeronautics by construction, installation, reengineering, relocation, or otherwise; (2) to make and amend such reasonable rules and regulations as he may deem necessary to the proper exercise of the powers granted by this section; (3) to lease under such conditions as he may deem proper and for such periods as may be desirable (not to exceed twenty years) space or property for purposes essential or appropriate to their consolidation, operation, protection, and administration under this chapter; (4) to contract for, or to provide directly for, the sale of fuel, oil, equipment, food and supplies, hotel accommodations, and other facilities and services necessary or desirable for the operation and administration of such properties; (5) to make just and reasonable charges for aeronautical services (including but not limited to landing fees and fees for the use of communication services); and (6) to acquire, by purchase or otherwise, real or personal property, or interests therein, which he may consider necessary for the purposes of this section."

Statement

On July 21, 1961 an Alaska Airlines' DC-6 crashed while attempting to land at the airport on Shemya Island in the Pacific Ocean. The airport was owned and administered by the Federal Aviation Agency under the International Aviation Facilities Act, 62 Stat. 450, 49 U.S.C. §1151

et seq., and was operated by Petitioner, Northwest Airlines, Inc. (Northwest) under the regulation of the FAA. Alaska Airlines (Alaska) brought suit for the loss of the aircraft against Northwest in the United States District Court for the District of Alaska. For one of its defenses, Northwest pleaded that the suit was barred by virtue of provisions in its published "Schedule of Charges" (which had been approved by the FAA) and in an agreement between the parties (pursuant to and incorporating the published schedule) which exculpated Northwest from liability to Alaska and all other airport users for losses arising out of their use of the Shemya facilities.[2]

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[2] Paragraph J of the Schedule of Charges, dated May 10, 1957 and approved by the FAA on July 12, 1957, provided:

> "Shemya and its facilities shall be listed in all publications as privately operated and available to the aeronautical public upon the terms and conditions set forth herein and at the sole risk of the user, and the user will specifically indemnify and hold Northwest Airlines, Inc., its employees, agents, contractors and subcontractors, harmless against any and all claims for loss, damage, injury or death arising out of or in any way connected with such use of the facilities or services provided at Shemya."

The Agreement between the parties was dated December 19, 1958 and incorporated all the provisions of the Schedule of Charges. In addition, Paragraph 4 provided:

> "Alaska agrees to hold harmless and indemnify Northwest, its officers, agents, contractors, servants and employees from all claims and liabilities for damage to, loss of, or destruction of any property of Alaska, its officers, agents, servants and employees, and the property of any other person or persons and for injuries to or death to any person or persons which may now or hereafter arise out of or be in any way connected with the services and facilities furnished to Alaska under this Agreement."

To avoid this defense, Alaska sought a declaratory judgment in the same court, basing jurisdiction on 28 U.S.C. §1332(a) (diversity of citizenship) and 28 U.S.C. §2201 (Declaratory Judgment Act), asserting that (1) neither the language of the Schedule of Changes nor of the Agreement was sufficiently clear to exonerate Northwest from responsibility for its sole negligence, and (2) should those provisions be construed to cover Northwest's sole negligence, both are invalid and unenforceable as contrary to the public policy of the State of Alaska. The District Court on April 14, 1964 adopted both of Alaska's contentions.

Northwest appealed to the Court of Appeals for the Ninth Circuit on the grounds that (1) the District Court's construction of the provisions was erroneous, and (2) the approval of the exculpatory provision by the FAA pursuant to federal statutory law foreclosed judicial consideration of the validity of the schedule and Agreement under the common law public policy of a state. Northwest further pointed out that the Court should defer to the FAA's primary jurisdiction to determine the validity of the provisions, under the doctrine of *Southwestern Sugar & Molasses, Inc.* v. *River Terminals Corp.*, 360 U. S. 411 (1959), which held that the validity of an exculpatory provision in a tariff filed by a regulated carrier with the Interstate Commerce Commission should be determined in the first instance by the ICC. The Court of Appeals on September 27, 1965 found that the exculpatory language was "perfectly clear" and that the unequivocal intent of the agreement between the parties was to protect Northwest from the consequences of its own negligence. Nevertheless, the Court of Appeals affirmed the District Court by holding that the FAA's regulation of Shemya was insufficient to require application of the doctrine of the

Southwestern case, and that the exculpatory provision was contrary to the "public policy" of the State of Alaska and hence invalid, notwithstanding FAA approval of the Schedule of Charges. Northwest's Petition for Rehearing was denied on November 3, 1965.

The foregoing is the broad outline of the case. Basic to an understanding of the federal issues, however, is a brief exposition of the historical background.

Anticipating the increase of international air commerce in the years following World War II, Congress in 1948 passed the International Aviation Facilities Act, 62 Stat. 450, 49 U.S.C. §1151 *et seq.* Its objective was to create and develop federally-owned air navigation facilities in extra-continental United States and foster the safe operation of American air carriers engaged in international air transportation.[3] The Civil Aeronautics Administration was empowered to acquire and establish airports in extra-continental United States territory, 49 U.S.C. §§1152, 1157, and to improve, operate and administer them, 49 U.S.C. §1159, either itself or, if necessary or desirable, under lease to private airport operators. 49 U.S.C. §1159 (a) (3).

During World War II, the United States Air Force had developed an airfield and related facilities on Shemya Island, a remote outpost at the far western end of the Aleutian Islands [FF 5, 6].[4] In 1955, the Air Force withdrew

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[3] House Report No. 1892, 80th Cong., 2d Sess. (1948), reported in U. S. Code Cong. Service (80th Cong., 2d Sess.) at 1803-1804. See also U. S. Air Coordinating Committee, *Report to the President*, reprinted in 1948 U. S. Aviation Reports 123, 128.

[4] "FF" references are to the findings of fact of the U. S. District Court below, as contained in the Transcript of the Record, Vol. 2.

from and closed down the Shemya installation, jurisdiction of which then was transferred to the Administrator of the Civil Aeronautics Administration pursuant to the International Aviation Facilities Act [FF 7]. The CAA chose not to operate and maintain the isolated airfield itself, but sought to contract out that function, as authorized by 49 U.S.C. §1159(a) (3). On September 30, 1955, the CAA reactivated Shemya by leasing it to Northwest, an air carrier with a North Pacific route [FF 9]. Among other things, the lease charged Northwest to operate as complete an air navigation facility as practicable on a non-discriminatory basis,[5] and provided for review and approval by the Administrator of Civil Aeronautics of all proposed charges for services, which were required to be fair and reasonable.[6]

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[5] Paragraph 2(c) of the lease provided:

"Lessee shall maintain and operate as complete an air navigation facility at Shemya as is practicable, including but not limited to: Landing areas, communications and navigation facilities, to be available to any civil or military aircraft of the United States or friendly foreign registry or ownership on a non-discriminatory basis."

[6] Paragraph 2(d) of the lease provided:

"Lessee shall furnish all available services at Shemya to the aeronautical public at fair and reasonable prices and shall, as soon as practicable hereafter and in any event within six months from the date hereof, furnish Lessor with a schedule of charges to be made for such services by Lessee at Shemya, which schedule of charges shall be approved by the Administrator of Civil Aeronautics or his designee unless found by him or his designee to be excessive, discriminatory, or unfair, in which case Lessee agrees to amend said schedule of charges to conform to those considered, in the judgment of Lessor, to be reasonable."

After undertaking operation of Shemya, Northwest submitted a Schedule of Charges to the CAA on April 6, 1956 and a revised Schedule on May 10, 1957 when commercial use of Shemya increased. Although the expense of maintaining and operating Shemya was greater, the May 10, 1957 Schedule provided for the same landing fees as the Anchorage and Fairbanks International Airports [FF 15, Tr. pp. 139-140].[7] It also contained in Paragraph J the aforementioned provision that the airport would be available "at the sole risk of the user."[8] On July 12, 1957 the CAA, per William B. Davis, Acting Administrator, approved all the provisions of the Schedule, including Paragraph J [FF 13, 36]. Subsequent contracts between Northwest and 15 other carriers authorized to use the Shemya facilities incorporated the "sole risk" and indemnification provisions in the published Schedule of Charges [FF 22, 25].

In late 1958, Alaska Airlines sought and obtained CAA authorization to make use of the Shemya facilities, and on January 5, 1958, entered into a letter agreement with Northwest dated December 19, 1958 [FF 12] which incorporated by reference the entire Schedule of Charges approved by the CAA [FF 13], and expressly provided for exculpation and indemnification of Northwest as required by Paragraph J of the Schedule.[9] No complaint was made by Alaska to the CAA or to its successor, the FAA, with respect to any of the various charges or the exculpatory and indemnity provisions found in the published Schedule

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[7] "Tr." references are to the trial transcript, Transcript of Record Vol. 3.

[8] See note 2 *supra*.

[9] See Note 2 *supra*.

and incorporated in the Agreement; Alaska availed itself of the Shemya facilities pursuant to the terms of the Agreement and the Schedule without complaint and without incident for over two and a half years, until the July 21, 1961 crash led it to challenge the validity of its Agreement with Northwest and the Schedule of Charges.

Reasons for Granting Certiorari

Petitioner's basic position before both the District Court and the Court of Appeals was (1) that the FAA, by virtue of its regulatory experience and legislative power, had the requisite expertise and control over Shemya to bring this case within the scope of *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411 (1959), and therefore, (2) that the FAA's approval of the exculpatory provision in question was within its power and foreclosed consideration of its validity wholly on the basis of state public policy. The crux of the decisional process below, therefore, should have been an analysis of the FAA's role with respect to Shemya in light of the holding in the *Southwestern* case. In neither opinion below, however, does the necessary analysis appear. Both courts merely stated the bald and inexplicable conclusion that the FAA did not have the requisite control over Shemya to come within the scope of *Southwestern* and, treating the case as an ordinary diversity action, held that the validity of the provision was governed by state public policy rather than by the FAA's approval.

The significance of the decision below, warranting the exercise of this Court's *certiorari* jurisdiction, is that this is not a simple diversity case but rather a case which necessarily involves fundamental questions of federal jurisdiction, federal agency power, and the relationship between

courts and agencies. These issues of federal law were not fully discussed or not reached by the Court in *Southwestern*. Moreover, the unexplained conclusions of the Court below conflict in principle with the rationale of *Southwestern* and confuse the precedential effect of that case.

Necessary to a complete understanding of the issues requiring consideration by the Supreme Court, but missing from the opinions below, is an examination of the FAA's functions, generally and with respect to Shemya, measured against the standards set forth in *Southwestern*. Preliminary to its discussion of the issues, therefore, petitioner will review briefly the decision in *Southwestern* and then, in relation to that case, the FAA's expertise and control over operation of the airport at Shemya.

A. The Southwestern Sugar & Molasses Case

The *Southwestern* decision arose from a challenge to validity of a provision in a tariff filed by a regulated water carrier with the Interstate Commerce Commission, but not specifically approved by that agency; the tariff provision exculpated the carrier from the consequences of its own negligence. Similar provisions in agreements between tug and tow had been held contrary to public policy and invalid under federal maritime law. See *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955). However, the Court in *Southwestern* pointed out that the considerations of public policy mentioned in *Bisso* to strike down exculpatory agreements, *i.e.*, to discourage negligence and to restrict those who have the power to drive hard bargains, are not necessarily applicable where the conduct of the parties is "effectively controlled by a pervasive regulatory scheme," such as that administered by the ICC. 360 U. S. at 418. The possibility that exculpatory agreements may repre-

sent an unfair economic overreaching by the tug owner, the Court noted, was effectively controlled by the ICC's power to regulate the tugboat's rates. *Ibid.* The Court therefore held that the validity of the exculpatory provision should in the first instance be determined by the ICC, which, with its expert knowledge of the physical operating circumstances and economic conditions of the industry, might find the exculpatory provision to be entirely fair and reasonable under the circumstances.

The *Southwestern* decision, therefore, stands for the proposition that when an agency like the ICC has (1) pervasive regulatory power over charges to effectively enable it control the power to drive hard bargains and (2) the expertise to evaluate the propriety of exculpatory tariff provisions in light of the safety and economic factors in the regulated industry, then it also has (3) the general power, subject to judicial review, to approve and authorize exculpatory arrangements under proper circumstances, notwithstanding contrary common law public policy.[10]

B. FAA Regulation of Shemya Falls Within the Scope of the Rule of Southwestern Sugar & Molasses.

Like *Southwestern*, the instant case arises from a challenge to the validity of an exculpatory provision in a tariff (Schedule of Charges) filed with—and in this case approved by—a federal administrative agency, the FAA.

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[10] This clearly was the conclusion of the majority of the Court, who, it must be assumed, would not have referred the issue of validity to the ICC if the ICC lacked the power to approve the provision. Moreover, the majority necessarily rejected the dissenting view of the Chief Justice, Mr. Justice Black and Mr. Justice Douglas that the ICC should not be able to override the rule of *Bisso* under any circumstances. 360 U. S. at 422.

Like the ICC, in its regulation of water carriers, the FAA, in its administration of airports and air navigation facilities under the International Facilities Act, has effective control over charges and "the power to drive hard bargains" and has the expertise to evaluate the economic and physical factors which determine the propriety of the use of exculpatory arrangements at airports under the International Aviation Facilities Act. Indeed, because of its extensive *operating* as well as regulatory experience, it would seem that the FAA is *better* equipped than the ICC to determine the propriety of an exculpatory provision.

To illustrate briefly, the FAA from its inception has operated in a field of commerce in which federal control has been described as "intensive and exclusive" and in which Congress through its agencies has asserted its pre-eminence in defining a "national public policy" in the use and development of the airways.[11] From the standpoint of expertise and control of safety factors which may arise from exculpatory agreements, the FAA examines, licenses, inspects and tests all technical personnel in the aviation industry (pilots, mechanics, airport control tower operators),

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[11] "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water."

* * *

"Congress has recognized the national responsibility for regulating air commerce. Federal control is extensive and exclusive."

Northwest Airlines, Inc. v. *Minnesota*, 322 U. S. 292, 303 (1944) (Jackson, J., concurring opinion). See also *Griggs* v. *Cty. of Allegheny*, 364 U. S. 84, 91-92 (1962). See particularly the Civil Aeronautics Act of 1938, 52 Stat. 977 *et seq.* and the Federal Aviation Program, 72 Stat. 731 (1958), 49 U.S.C. §§1301-1542, both of which set forth a comprehensive national aviation policy with respect to development of civil air commerce.

49 U.S.C. §§1422, 1429, 1430, and essential equipment (aircraft, engines, propellers and air navigation equipment), 49 U.S.C. §§1423, 1425, and airports, 49 U.S.C. §§1426, 1429. Moreover, the FAA has expertise in the field of the economics of airport operation, for it operates and sets the charges at Dulles International Airport, 64 Stat. 770 (1950) and Washington National Airport, 54 Stat. 686 (1940), *FAA First Ann. Rep.* 37 (1959). It operates international air terminals in the Pacific at Wake Island, Canton Island, Cold Bay in the Aleutians, and, until recently, Fairbanks and Anchorage [Tr. pp. 30, 31]. The FAA administers the Federal Airport Act, 60 Stat. 170 (1946), 49 U.S.C. §1101 *et seq.*, under which it provides planning and federal aid for the development of public airports.

This general expertise is combined with full regulatory control of airports, like Shemya, administered by the FAA under the International Aviation Facilities Act. That legislation was intended to foster the development of international air commerce. It empowers the FAA to perform "All acts and things necessary or incident to . . . consolidation, operation, protection, maintenance, improvement, and administration" of airports acquired thereunder, and specifically provides that actual operating duties may be contracted out. 49 U.S.C. §1159 (a) (3). The FAA is specifically directed and empowered to regulate the reasonableness of all proposed charges at those airports, 49 U.S.C. §1159(a)(5).[12] By its lease with Northwest, FAA re-

[12] Such regulatory power over charges for services is generally held to include the power to approve or reject provisions excluding or limiting liability, which are recognized as integral parts of the charged rates. *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411, 418 (1959); *Western Union Tel. Co.* v. *Esteve Bros.*, 256 U. S. 566, 571 (1921); *Boston & M. R. R.* v. *Hooker*, 233 U. S. 97, 116 (1914); *Lichten* v. *Eastern Airlines, Inc.*, 189 F. 2d 939 (2d Cir. 1951).

served the power and prescribed procedures for its review of the amount, fairness and reasonableness of proposed charges at Shemya in accordance with its statutory duty. See n. 6 *supra*. And of course, all the FAA's regulatory powers in the safety area are applicable to personnel and air navigation equipment at Shemya.

Thus, to a degree even greater than the ICC in *Southwestern*, the FAA has specific and effective control of "the power to drive hard bargains" and of any possible tendency toward negligent operation at Shemya, as well as the general expertise to evaluate the propriety of an exculpatory provision at Shemya in light of the physical and economic circumstances and the goals of the International Aviation Facilities Act.[13] The FAA falls well within the guidelines laid down in *Southwestern* and, like the ICC, should have been held to have the general power, subject to judicial review, to approve and authorize exculpatory arrangements under proper circumstances, notwithstanding contrary common law public safety.

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[13] The FAA had valid reason in approving the exculpatory provision to consider the Alaskan public policy inapplicable and unnecessary. In view of Shemya's remote location, it may have considered the provision a desirable inducement or an economic necessity in order to have Shemya operated by a private corporation. Recognizing that as between large corporations an exculpatory agreement merely shifts the cost of insurance premiums from one party to another, see *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411, 418 (1959) the FAA may have felt the exculpatory provision was the only way landing fees at Shemya could be kept in line with charges at the more accessible Fairbanks and Anchorage Airports. The FAA may have felt the provision was not conducive of negligence because of its own supervision of personnel and facilities, because Northwest's own aircraft regularly used the Shemya field, and because the very assumptions of the "public policy" are undercut when the exculpatee is a large corporation whose employees are not even aware of the existence of the agreement.

C. The Decision of the Court of Appeals and its Consequences.

The Court of Appeals decided, without explanation, that the operation of Shemya Airport was not "effectively controlled by a pervasive regulatory scheme" so as to bring the case within the principle of *Southwestern* and consequently that the validity of the exculpatory provision was exclusively governed by the public policy of the State of Alaska.

Both the failure to apply *Southwestern* and the governing effect given the public policy of the State of Alaska involve serious errors of federal law which call for review by the Supreme Court. These two points will be discussed in turn.

1. The Failure to Apply the Southwestern Case.

The decision that the FAA lacked sufficient power or expertise in its regulation of Shemya to require adherence to the doctrine of *Southwestern* has implications that extend far beyond the result of this case. There are two reasons for this effect.

First, the decision strikes directly at the power of the FAA under the International Aviation Facilities Act. Since it holds that the FAA does not fall within the doctrine of *Southwestern,* the FAA does not have, under the decision below, either (1) the right to primary jurisdiction over the question of the validity of exculpatory provisions (as the ICC did in *Southwestern*) or (2) the power to approve a Schedule of Charges provision which contravenes common law "public policy" (as the ICC was held to have in *Southwestern*). Therefore, contrary to the Constitutional pre-eminence over state law of federal regulation of interstate and foreign commerce, *U. S. Const.*,

Art. I, Section 8, *Clause* 3; *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), the FAA, in attempting to implement the International Aviation Facilities Act, must defer to the divergent dictates of "public policy" of each state in which it operates.

Secondly, because the decision conflicts so sharply with the rationale of *Southwestern,* it confuses the doctrine of that case and, therefore, confuses the law governing the powers of many other agencies and their relationship with the courts. Since the Court of Appeals offered no explanation of its conclusion, and yet it is impossible to perceive in what respect the FAA's expertise and regulatory powers at Shemya falls short of the ICC's control of water carriers, the decision below naturally raises the question, "If the doctrine of *Southwestern* does not apply in this case, when does it apply?" Until the standards for determining when an agency has "effective control" or a "pervasive regulatory scheme" are clarified by this Court, the decision below leaves the courts, the agencies and those who deal with them in doubt as to whether an administrative agency comes within the principles of *Southwestern.*

For example, if the FAA, in its regulation of Shemya, does not come within the doctrine of *Southwestern* and consequently must defer to the public policy of the several states, the FAA in its other functions and other federal administrative agencies are necessarily unclear as to whether they have sufficient expertise and regulatory power to make a determination contrary to common law public policy. Also, under the decision below, the FAA must refrain from approving exculpatory provisions for airports in Alaska, although it might well be able to if the airport were in Florida, whose public policy upholds exculpatory agreements between large business enterprises. *Cf. Jack-*

sonville Terminal Co. v. *Railway Express Agency, Inc.*, 296 F. 2d 256 (5th Cir. 1962). Consequently, the decision below indicates that other agencies whose expertise and regulatory powers do not appear to exceed those of the FAA must also be frustrated in their attempts to achieve uniform national regulation of commerce in accordance with their statutory purposes.

Similarly, if the FAA, which has great expertise and special knowledge of safety, economic, and operating factors, does not have primary jurisdiction over challenges to the validity of an exculpatory provision operative at Shemya, the doctrine of primary jurisdiction in general is restricted by the opinion below. Unless the FAA is empowered to determine in the first instance the propriety of conditions of use imposed at airports under the International Aviation Facilities Act, no cohesive and economically realistic airport-use policy can be developed, for the conditions of use at each airport will be subject to challenge and determination in the courts of each state. Similarly, by restricting the doctrine of primary jurisdiction, the decision below stands as authority for the courts to deny other federal administrative agencies the opportunity to make initial decisions on the validity of exculpatory provisions in their respective regulatory fields.

Moreover, the confusion created by the decision below as to the applicability of the doctrine of *Southwestern* affects adversely those who are regulated by the FAA and those who deal with them. If Northwest and Alaska Airlines can operate for two and a half years under an exculpatory provision approved by the FAA, then to have it challenged and overturned in court on the basis of state law, no federally-regulated enterprise or those who deal with it can be certain that the regulations under which they have been operating will not be overturned by a sub-

sequent court decision that the regulating agency is not within *Southwestern* and that state law controls. Only the clarification by the Supreme Court of the standards for application of the doctrine of *Southwestern* can avert the widespread uncertainty and frustration of federal regulatory efforts that will result from the decision below.

2. *The Role of State Public Policy in Agency Determinations; Scope of Judicial Review.*

The erroneous conclusion of the Court of Appeals that the FAA did not effectively control operations at Shemya within the meaning of *Southwestern*, in addition to limiting the power of the FAA and confusing the applicability of *Southwestern*, had two further consequences requiring review on *certiorari*. First, the Court of Appeals failed to deal with an important question of federal law not reached by the Court in *Southwestern* but properly and necessarily presented by this case, *i.e.*, the scope of judicial review of a determination by an agency having the status and powers of the ICC (here, the FAA) that an exculpatory provision is reasonable. Second, whether a federal agency or department which is held not to fall within the scope of *Southwestern* can properly approve or authorize contractual provisions which contravene state public policy.

a. The Scope of Judicial Review

In *Southwestern*, where the Court referred to the ICC the question of validity of an exculpatory tariff provision filed with but not approved by that agency, the Court stated, 360 U. S. at 420:

> "We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution."

However, the case did not come back to the Supreme Court, and the Court did not reach the question of the scope and nature of judicial review following administrative *approval* of an exculpatory clause which is contrary to common law public policy.

This question is squarely presented by the instant case. Here, the exculpatory provision in question already had been approved by the FAA, an administrative agency whose expertise and effective regulatory control of the operations at Shemya are at least the equivalent of that of the ICC, and the FAA's determination was made pursuant to its administration of the International Aviation Facilities Act. The question presented, therefore, is the scope of judicial review of agency action and the weight, if any, to be accorded the public policy of the State of Alaska in such review, *e.g.*, is the agency free to make its initial determination without reference to state public policy, or should it consider that policy and to what extent?

Under familiar principles of administrative law, see, *e.g.*, *Gray* v. *Powell*, 314 U. S. 402 (1941); *Airline Pilot's Ass'n* v. *Quesada*, 276 F. 2d 892 (2d Cir. 1960), it would seem that judicial review of an agency approval of an exculpatory provision should be limited to a determination of whether the administrative action was within the statutory powers of the administrative body and was reasonable under the facts and in terms of the statutory purpose. Specific guidance from the Supreme Court, however, is needed as to what weight should be given state public policy by the courts in determining the "reasonableness" of determinations by agencies which are within the scope of the *Southwestern* case and by the agencies themselves in making their initial determinations.

b. State Public Policy and Agencies not within the Scope of Southwestern

The Court of Appeals, because of its erroneous conclusion that the FAA was not within *Southwestern*, apparently felt that on review, it need give no weight whatever to the FAA approval of the provision, and that the question of validity was to be determined anew by the courts under state public policy. In other words, the Court apparently assumed that *Southwestern* holds that *only* agencies which, like the ICC, have "effective control" through a "pervasive regulatory scheme" have the power to approve an exculpatory provision that contravenes state public policy, and that without the power to approve, an agency's determination is completely irrelevant. The decision below, therefore, stands for the proposition that, except in those instances where *Southwestern* controls, a determination of a federal administrative agency, acting within the scope of its Congressionally-delegated powers, may be completely subordinated to conflicting state public policy. The implication of the decision below is that the Federal Government, when acting through administrative agencies other than the ICC and those comparable to it, must subordinate its programs and regulatory control to the dictates of the public policy of each of the fifty states. The decision below, therefore, contravenes the policy of of the Commerce Clause, Article I, Section 8, Clause 3, and the Supremacy Clause, Article VI, of the United States Constitution and conflicts in principle with federal cases which, without reference to *Southwestern*, have held that particularly in the field of aviation, where federal regulation is intensive and exclusive, local law cannot override the determinations of a federal regulatory agency which conflict with state law. See *Allegheny Airlines* v. *Village of Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956); *United*

States v. *Eastern Airlines*, 132 F. Supp. 812 (E. D. N. Y. 1955).[14]

Thus, the Court of Appeals' review and *de facto* reversal of the FAA's approval of the exculpatory provision in this case wholly on the basis of state law subordinates to state public policy the acts of every federal administrative agency not within the scope of *Southwestern*, frustrating the purposes of Congressional regulation and the United States Constitution. Supreme Court review and correction is therefore necessary to define the powers of federal agencies not within *Southwestern* to authorize contracts contrary to state law and to define the proper standard of court review of such agency action.

CONCLUSION

As shown above, the Court of Appeals in this case decided incorrectly important federal questions involving the relationship between federal and state law and between the courts and federal administrative agencies. Its decision impedes the function of the FAA under the International Aviation Facilities Act and, in process, derogates

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[14] In support of its conclusion that a federal agency not within the scope of *Southwestern* lacks the power to override state public policy, the Court of Appeals relied on its decision in *Air Transport Associates* v. *United States*, 221 F. 2d 467 (9th Cir. 1955), where it had invalidated under Alaskan public policy an exculpatory agreement between the Air Force and a private user of an Air Force landing field. However, *Air Transport* was decided under the Federal Tort Claims Act, pursuant to which the Government waived its sovereign immunity and *agreed* to be bound by state law, and therefore is not authority for the proposition that the Government, when acting pursuant to a legislative program to regulate and promote commerce, is subject to state public policy. See generally, *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824).

its general expertise and authority in the aviation field. In addition, as a result of its finding that this Court's decision in the *Southwestern* case is inapplicable here, the precedential effect of *Southwestern* is restricted and numerous federal agencies and those who deal with them are subjected to uncertainty as to the law which governs their actions. By subordinating a federal agency determination to state public policy, the decision below contravenes and hinders the purposes of the Commerce Clause and Supremacy Clause of the United States Constitution.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

(April 14, 1964)

PLUMMER, District Judge.

By this action the parties seek a declaration of their rights arising out of an agreement relating to the use of an airport and related facilities at Shemya, Alaska.

In September of 1955 the United States of America was the owner and had jurisdiction over the Island of Shemya. The air navigation facility located there was administered by the Administrator of Civil Aeronautics Administration under the provisions of the International Aviation Facilities Act (62 Stat. 450, 49 U.S.C.A. §1151 et seq., Act of June 16, 1948, c. 473). 49 U.S.C.A. §1159 provides, in part, as follows:

> "(a) With regard to airport property and airway property in territory (including Alaska) outside the continental limits of the United States which he has acquired pursuant to this chapter or any other provision of law, the Administrator is empowered and directed to do and perform, by contract or otherwise, all acts and things necessary or incident to their consolidation, operation, protection, maintenance, improvement, and administration, including but not limited to the power * * *. (3) to lease under such conditions as he may deem proper and for such periods as may be desirable (not to exceed twenty years) space or property for purposes essential or appropriate to their consolidation, operation, protection, and administration under this chapter; * * *."

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On September 30, 1955, defendant leased the Shemya airfield from the United States of America, the United States being represented by the Administrator of Civil Aeronautics Administration. The lease contained, among others, the following provisions:

> "WHEREAS, it is considered to be in the public interest that said air navigation facilities at Shemya be available to the aeronautical public on a non-discriminatory basis:"

and

> "(c) Lessee shall maintain and operate as complete an air navigation facility at Shemya as is practicable including, but not limited to: landing areas, communications and navigation facilities, to be available to any civil or military aircraft of the United States or friendly foreign registry or ownership on a non-discriminatory basis.
>
> "(d) Lessee shall furnish all available services at Shemya to the aeronautical public at fair and reasonable prices and shall, as soon as practicable hereafter and in any event within six months from the date hereof, furnish Lessor with a schedule of charges to be made for such services by Lessee at Shemya, which schedule of charges shall be approved by the Administrator of Civil Aeronautics or his designee unless found by him or his designee to be excessive, discriminatory, or unfair, in which case Lessee agrees to amend said schedule of charges to conform to those considered, in the judgment of Lessor, to be reasonable."

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On January 5, 1959, an agreement pertaining to Alaska's use of the Shemya facilities was entered into between Northwest and Alaska. It provided, in part, as follows:

> "4. Alaska agrees to hold harmless and indemnify Northwest, its officers, agents, contractors, servants and employees from all claims and liabilities for damage to, loss of, or destruction of any property of Alaska, its officers, agents, servants and employees, and the property of any other person or persons, and for injuries to or death of any person or persons which may now or hereafter arise out of or be in any way connected with the service and facilities furnished to Alaska under this agreement."

By reference, a schedule of charges for Shemya airport dated May 10, 1957, submitted to CAA by Northwest Airlines and approved by the Acting Administrator of the CAA on July 12, 1957, was made a part of the agreement between Northwest and Alaska. This schedule of charges provided, in part, as follows:

> "J. Shemya and its facilities shall be listed in all publications as privately operated and available to the aeronautical public upon the terms and conditions set forth herein and at the sole risk of the user, and the user will specifically indemnify and hold Northwest Airlines, Inc., its employees, agents, contractors and subcontractors, harmless against any and all claims for loss, damage, injury or death arising out of or in any way connected with such use of the facilities or services provided at Shemya."

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On July 21, 1961, while Northwest was operating the Shemya airfield under the terms of its lease agreement with the United States of America, a DC6 airplane owned by Alaska and operated by it as flight 779, crashed and burned near the approach end of Runway 10 at Shemya. All six crew members aboard the aircraft were killed and the aircraft was destroyed or substantially damaged.

In a separate action pending in this court (No. J-4-63 Civil), Alaska has sued Northwest alleging that its negligence was the sole and proximate cause of the accident and seeking to recover for the loss of the aircraft and attendant damages. Northwest has denied Alaska's allegations of negligence and has, in turn, alleged contributory negligence and assumption of risk on the part of Alaska. As a further affirmative defense, Northwest claims the protection of the exculpatory provisions contained in the agreement of January 5, 1959.

Six wrongful death actions have been instituted against Northwest in other courts by personal representatives of the deceased crew members. Northwest has demanded that Alaska defend those cases, basing this claim upon the exculpatory provisions of the agreement.

The combined total recovery sought by these actions approximates $3,000,000.00. This action was brought for the purpose of obtaining a declaration of the rights existing between Alaska and Northwest under the exculpatory provisions of the agreement of January 5, 1959.

This court has jurisdiction under 28 U.S.C.A. § 1332(a) and under the declaratory judgment provisions contained in 28 U.S.C.A. §§ 2201 and 2202.

Appendix A

The parties are in complete agreement that the exculpatory provisions contained in the agreement of January 5, 1959, are clear and unequivocal. Alaska vigorously contends that the contract clearly did not provide that Northwest would be indemnified against its own negligence. Defendant with equal vigor contends just the opposite. Provisions similiar to those involved in the present case were contained in agreements which Northwest had with Scandinavian Airlines System, Inc., and Japan Airlines Company, and were construed by them to include damage to, loss of, or destruction of property and injury to or death of persons caused by the gross negligence or willful conduct of Northwest Airlines.

In United States v. Wallace, 18 F. 2d 20, 21 (9th Cir. 1927), the court, with reference to an indemnity provision there being considered, stated as follows:

> "Read literally, the language is undoubtedly broad enough to cover not only cases were both indemnitor and indemnitee are negligent, but cases where, as here, the indemnitee alone is chargeable. But in the light of the circumstances and of established principles of interpretation, should it be so understood? * * *"

In American Stevedores v. Porello, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947), the court in holding an indemnity provision to be ambiguous stated:

> "It may be that parties only meant American to indemnify the United States should the Government be held liable for damages solely caused by American's negligence. It may be that the intention was that American should fully reimburse the United

States for all damages caused in any part by American's negligence. Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault."

The similarity of the provisions presently under consideration with those considered in Wallace and Porello is sufficient to raise a serious question as to whether they can be said to be expressed in clear and unequivocal terms.

A contract of indemnity will not be construed to indemnify a person against his own negligence unless such intention is expressed in "clear and unequivocal terms." An examination of the reported cases readily establishes that the words "clear and unequivocal terms" can be interpreted in more than one manner.

The letter agreement between the parties dated December 19, 1958, was addressed to Alaska Airlines, Inc., 435 Fourth Avenue, Anchorage, Alaska, to the attention of Mr. Kelley Weiss, Assistant Vice President—Operations, and accepted by him on behalf of Alaska on January 5, 1959. The place of contracting is the place where the last event necessary to make the contract occurs. Consequently, the construction and validity of the present contract is to be determined according to the law of Alaska. Since the letter agreement was drafted and prepared by Northwest any question of doubt in its interpretation should be construed against Northwest.

The Supreme Court of Alaska has not as yet passed upon the issues presented by this case. Under these circumstances this court is required to use its best judgment in

predicting what the State court would hold. Tavernier v. Weyerhaeuser Company, 309 F. 2d 87, 91 A. L. R. 2d 1268 (9th Cir. 1962).

Plaintiff suggests that the opinion of the United States Court of Appeals for the Ninth Circuit in United States v. Wallace, supra, should be controlling since it was determinative of the law in Alaska prior to statehood and no Alaskan court has since spoken on the subject. In Wallace the court was required to construe an indemnifying provision which provided:

> "The contractor is to fully protect the ship and owners against any and all claims for injury to workmen engaged by him or his subcontractor, in carrying out work on the vessel."

In holding that this clause did not indemnify the owner, the United States of America, against its own negligence, the court stated, in part, as follows:

> "The established principle is thought to be that general words alone do not necessarily import an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter; it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in clear and unequivocal terms."

Defendant responds to this suggestion by asserting that although Wallace may be distinguished from the present case purely on the language of the clause, the actual ground of distinction is much broader, and that while Wallace may have represented a view prevalent in the Ninth Circuit 35 years ago, the case has never been cited by that court since and its reasoning has been completely rejected.

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In Southern Pac. Co. v. Layman, 173 Or. 275, 145 P. 2d 295 (1944), the Supreme Court of Oregon construed an indemnity provision which provided:

> "Licensee shall and hereby expressly agrees to indemnify and save harmless the Licensor and its lessor from and against any and all loss, damage, injury, cost and expense of every kind and nature, from any cause whatsoever, resulting directly or indirectly from the maintenance, presence or use of said crossing."

In holding that the provision did not cover losses caused by the indemnitee's negligence, the Supreme Court of Oregon quoted excessively from Wallace and cited and relied upon all of the cases cited by the Ninth Circuit Court of Appeals in its opinion in Wallace.

However, defendant states that the Supreme Court of Oregon in Southern Pacific Co. v. Morrison-Knudsen Co., 216 Or. 398, 338 P. 2d 665 (1959), has restricted Layman to its facts and arrived at a completely different result on similar language.

In Boise Cascade Corp. v. Nicholson Manufacturing Co., 221 F. Supp. 135 (D. C. Or. 1962), the court adhered to the rule laid down by the Supreme Court of Oregon in Layman and clearly distinguished the holding in Morris-Knudsen.

The decision of the district court was affirmed in a per curiam opinion, Boise Cascade Corp. v. Nicholson Manufacturing Co., 322 F. 2d 792 (9th Cir. 1963), which states as follows:

> "We refer to and adopt the opinion of the District Court appearing at 221 F. Supp. 135 and affirm the judgment for the reasons therein stated."

Layman embodies the rationale of Wallace. The rationale of Layman is clearly adopted by the United States District Court of Oregon in Nicholson Manufacturing Co. On appeal the United States Circuit Court of Appeals, in the clearest of language, adopts the logic and reasoning of Wallace and Layman.

Wallace is probably the leading case, and has been cited with approval on numerous occasions, for the proposition that to impose liability upon an indemnitor for the negligence of the indemnitee, the intention of the parties must be expressed in clear and unequivocal terms.

As previously stated, the Supreme Court for the State of Alaska has not had occasion to decide the precise question here presented. Plaintiff's suggestion that the Ninth Circuit's opinion in the Wallace case should be controlling on this court is entitled to serious consideration.

The act of May 17, 1884, c. 53, sec. 7, 23 Stat. 24, 25-26, an act providing a civil government for the Territory of Alaska, provided, in part, as follows:

> "Sec. 7. That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States * * *."

Historically the courts of the Territory of Alaska considered the opinion of the Supreme Court of Oregon as being highly persuasive. There has been no indication to date that the Supreme Court of the State of Alaska will deviate from or abandon this practice. Under the circumstances of the present case, this court believes that the Supreme Court of Alaska, if faced with this question, would

quite properly follow the logic and reasoning of the decisions in Wallace, Layman and Nicholson Manufacturing Co.

The construction to be given the exculpatory provisions under consideration in this case can best be stated by paraphrasing the conclusion of the District Court of Oregon in Nicholson Manufacturing Co. as follows: Whatever else the general promise of indemnity may include, the rule in Wallace, Layman and Nicholson Manufacturing Co. prohibits this court from reading into it an intent to indemify for losses caused by the sole negligence of the indemnitee. If, in this case, Northwest had wished to make Alaska an insurer not only for losses caused by Alaska's acts, but also for losses caused by Northwest's sole negligence, that intention should have been expressed in clear and unequivocal language. The language here falls short of this requirement.

Alaska also contends that this case falls squarely within the facts and logic of Air Transport Associates, Inc. v. United States, 221 F. 2d 467 (9th Cir. 1955). Northwest, however, states that Air Transport is not applicable since Shemya airport was not being operated by it as a public facility.

49 U.S.C.A. §1349 (sec 303 of the Civil Aeronautics Act of 1938, 52 Stat. 973, 986) provides that there shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended. It was stipulated by the parties that federal funds had been expended on the airport at Shemya in the early 1950's. For this reason, no exclusive right of use in connection with the facilities at Shemya could be granted to defendant or to anyone else.

Appendix A

The lease of September 30, 1955, between the United States of America and Northwest declares it to be in the public interest that the facilities at Shemya be available to the aeronautical public on a non-discriminatory basis; required that the facilities be available to any civil or military aircraft of the United States or friendly foreign registry or ownership on a non-discriminatory basis; and required that Northwest furnish all available services at Shemya to the aeronautical public at fair and reasonable prices to be approved by the Administrator of CAA or his designee.

Paragraph J of the schedule of charges submitted by Northwest and approved by the Acting Administrator of CAA on July 12, 1957, provided in part that Shemya and its facilities should be listed in all publications as privately operated and available to the aeronautical public.

The court finds that on July 21, 1961, the facilities at Shemya were being operated by Northwest as a public airport within the purview of Air Transport Associates, Inc. v. United States, supra, and adopts as controlling the opinion in that case.

Defendant's efforts to distinguish this case from Air Transport on the ground that an approved tariff provision is involved in the present case is discussed later in this decision. Suffice it to say, at this point, that it is reasonable to conclude that the conditions of the use of Elmendorf Air Force Base airfield were not established unilaterally by those using the field but that the conditions imposed upon its use were those deemed proper by, and subject to, the approval of some officer or agency of the United States which, in reality, is all that was required in the present case.

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It is Northwest's contention that regardless of the validity of paragraph 4 of the agreement of January 5, 1959, paragraph J of the schedule of charges which was approved by the Acting Administrator of the Civil Aeronautics Administration on July 12, 1957, which by reference was made a part thereof, is an approved tariff provision and is unquestionably valid and controlling in this case. This contention on the part of the defendant is predicated upon Southwestern Sugar and Molasses Co., Inc. v. River Terminals Corp., 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334 (1959). Defendant's reliance on Southwestern Sugar presupposes that the schedule of charges here involved is a tariff filed with and subject to the pervasive regulatory authority of an expert administrative body and that the situation is effectively controlled by a pervasive regulatory scheme.

49 U.S.C.A. §1159, section 10 of the International Aviation Facilities Act, supra, p. 2, under which the lease between the United States of America and Northwest came into existence, authorizes the Director of the Civil Aeronautics Administration in connection with airport property in territories, including Alaska, to lease under such conditions as he may deem proper space or property for purposes essential or appropriate to their consolidation, operation, protection and administration and to make just and reasonable charges for aeronautical services. The lease of September 30, 1955, between the United States of America and Northwest required that Northwest, within 6 months from the date of the lease furnish the United States with a schedule of charges, to be approved by the Administrator of CAA, to be made by Northwest for such services at Shemya.

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Courts may take judicial notice of federal statutes and regulations prescribing the powers, duties, authority and jurisdiction of the Civil Aeronautics Administration and of the Administrator of that agency. From a review of the statutes and regulations on this subject in effect on July 12, 1957, the date on which the schedule of charges of which paragraph J forms a part, was approved by the Acting Administrator of the CAA, the court finds that the CAA and the Administrator of that agency was not on that date an expert administrative body with pervasive regulatory authority within the purview of the Supreme Court's decision in Southwestern Sugar Co. v. River Terminals, supra.

The facts of the present case bring it within the rule of Bisso v. Inland Waterways Corp., 349 U. S. 85, 77 S. Ct. 629, 99 L. Ed. 911 (1955), and the companion case of Boston Metals Co. v. The Winding Gulf, 349 U. S. 122, 75 S. Ct. 649, 99 L. Ed. 933 (1955), as reiterated in Dixilyn Drilling Corp. v. Crescent Towing & Salvage Company, 372 U. S. 697, 83 S. Ct. 967, 10 L. Ed. 2d 78 (1963). The rationale of these cases is that agreements of the type here involved relieving one from the consequences of his own negligence are unenforceable. The rule is grounded on public policy with the end in mind of discouraging negligence by making wrongdoers pay damages, and of protecting those in need of services from been overreached by others having power to drive hard bargains. On the authority of these cases the court finds paragraph 4 and paragraph J of the agreement of January 5, 1959, invalid.

Pursuant to court rule 12, counsel for Alaska is directed, within fifteen (15) days from date, to prepare, serve and submit proposed findings of fact, conclusions of law and judgment.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[September 27, 1965]

Appeal from the United States District Court
for the District of Alaska

Before: HAMLIN, MERRILL and ELY, Circuit Judges

ELY, Circuit Judge:

Northwest Airlines, Inc., instituted a suit for declaratory relief against Alaska Airlines, Inc. In this opinion the parties will be called "Northwest" and "Alaska". The suit was brought under the authority of 28 U.S.C. §2201, and "Northwest" appeals from an adverse judgment.

The District Court, in its reported opinion, 228 F. Supp. 322 (D. Alaska 1964), fully recites the controlling facts, and the elaborate recitation is quoted in the footnote below.[1]

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[1] "In September of 1955 the United States of America was the owner and had jurisdiction over the Island of Shemya. The air navigation facility located there was administered by the Administrator of Civil Aeronautics Administration under the provisions of the International Aviation Facilities Act (62 Stat. 450, 49 U.S.C.A. §1151 *et seq.*, Act of June 16, 1948, c. 473). 49 U.S.C.A. §1159 provides, in part, as follows:

'(a) With regard to airport property and airway property in territory (including Alaska) outside the continental limits of the United States which he has acquired pursuant to this chapter or any other provision of law, the Administrator is empowered and

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directed to do and perform, by contract or otherwise, all acts and things necessary or incident to their consolidation, operation, protection, maintenance, improvement, and administration, including but not limited to the power * * *. (3) to lease under such conditions as he may deem proper and for such periods as may be desirable (not to exceed twenty years) space or property for purposes essential or appropriate to their consolidation, operation, protection, and administration under this chapter; * * *.'

"On September 30, 1955, defendant leased the Shemya airfield from the United States of America, the United States being represented by the Administrator of Civil Aeronautics Administration. The lease contained, among others, the following provisions:

'WHEREAS, it is considered to be in the public interest that said air navigation facilities at Shemya be available to the aeronautical public on a non-discriminatory basis:'

and

'(c) Lessee shall maintain and operate as complete an air navigation facility at Shemya as is practicable including, but not limited to: landing areas, communications and navigation facilities, to be available to any civil or military aircraft of the United States or friendly foreign registry or ownership on a non-discriminatory basis.

'(d) Lessee shall furnish all available services at Shemya to the aeronautical public at fair and reasonable prices and shall, as soon as practicable hereafter and in any event within six months from the date hereof, furnish Lessor with a schedule of charges to be made for such services by Lessee at Shemya, which schedule of charges shall be approved by the Administrator of Civil Aeronautics or his designee unless found by him or his designee to be excessive, discriminatory, or unfair, in which case Lessee agrees to amend said schedule of charges to conform to those considered, in the judgment of Lessor, to be reasonable.'

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"On January 5, 1959, an agreement pertaining to Alaska's use of the Shemya facilities was entered into between Northwest and Alaska. It provided, in part, as follows:

> '4. Alaska agrees to hold harmless and indemnify Northwest, its officers, agents, contractors, servants and employees from all claims and liabilities for damage to, loss of, or destruction of any property of Alaska, its officers, agents, servants and employees, and the property of any other person or persons, and for injuries to or death of any person or persons which may now or hereafter arise out of or be in any way connected with the service and facilities furnished to Alaska under this agreement.'

"By reference, a schedule of charges for Shemya airport dated May 10, 1957, submitted to CAA by Northwest Airlines and approved by the Acting Administrator of the CAA on July 12, 1957, was made a part of the agreement between Northwest and Alaska. This schedule of charges provided, in part, as follows:

> 'J. Shemya and its facilities shall be listed in all publications as privately operated and available to the aeronautical public upon the terms and conditions set forth herein and at the sole risk of the user, and the user will specifically indemnify and hold Northwest Airlines, Inc., its employees, agents, contractors and subcontractors, harmless against any and all claims for loss, damage, injury or death arising out of or in any way connected with such use of the facilities or services provided at Shemya.'

"On July 21, 1961, while Northwest was operating the Shemya airfield under the terms of its lease agreement with the United States of America, a DC6 airplane owned by Alaska and operated by it as Flight 779, crashed and burned near the approach end of Runway 10 at Shemya. All six crew members aboard the aircraft was killed and the aircraft was destroyed or substantially damaged.

"In a separate action pending in this court (No. J-4-63 Civil), Alaska has sued Northwest alleging that its negligence was the sole

(Continued on following page)

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It appears that in 1955 the island of Shemya, now a part of the State of Alaska, was owned by, and under the jurisdiction of, the United States of America. On the island there was an airfield administered by the Civil Aeronautics Administration. On September 30, 1955, the United States, acting through the Administrator of the Administration, leased the facility to "Northwest". The lease recited, "WHEREAS, it is considered to be in the public interest that said air navigation facilities at Shemya be available to the aeronautical public on a nondiscriminatory basis: * * *", and it specifically required that "(d) Lessee shall furnish all available services at Shemya to the aeronautical public at fair and reasonable prices * * *".

On January 5, 1959, "Northwest" and "Alaska" executed, in Alaska, a contract by which "Alaska", a common air carrier, acquired the right to use the Shemya air-

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and proximate cause of the accident and seeking to recover for the loss of the aircraft and attendant damages. Northwest has denied Alaska's allegations of negligence and has, in turn, alleged contributory negligence and assumption of risk on the part of Alaska. As a further affirmative defense, Northwest claims the protection of the exculpatory provisions contained in the agreement of January 5, 1959.

"Six wrongful death actions have been instituted against Northwest in other courts by personal representatives of the deceased crew members. Northwest has demanded that Alaska defend those cases, basing this claim upon the exculpatory provisions of the agreement.

"The combined total recovery sought by these actions approximates $3,000,000.00. This action was brought for the purpose of obtaining a declaration of the rights existing between Alaska and Northwest under the exculpatory provisions of the agreement of January 5, 1959."

port and facilities. The contract contained an indemnity provision as follows:

> "4. Alaska agrees to hold harmless and indemnify Northwest, its officers, agents, contractors, servants and employees from all claims and liabilities for damage to, loss of, or destruction of any property of Alaska, its officers, agents, servants and employees, and the property of any other person or persons, and for injuries to or death of any person or persons which may now or hereafter arise out of or be in any way connected with the service and facilities furnished to Alaska under this agreement."

A schedule of charges, submitted by "Northwest" on May 10, 1957 in compliance with a requirement of the lease agreement between the United States and "Northwest", was approved by the Acting Administrator of the Civil Aeronautics Administration on July 12, 1957 and, by reference, was included as a part of the contract between "Northwest" and "Alaska". This schedule contained the following provision:

> "J. Shemya and its facilities shall be listed in all publications as privately operated and available to the aeronautical public upon the terms and conditions set forth herein and at the sole risk of the user. and the user will specifically indemnify and hold Northwest Airlines, Inc., its employees, agents, contractors and subcontractors, harmless against any and all claims for loss, damage, injury or death arising out of or in any way connected with such use of the facilities or services provided at Shemya."

Appendix B

On July 21, 1961, an aircraft owned and operated by "Alaska" crashed and burned on the Shemya airport. The six members of the crew were killed. "Alaska", alleging that negligence on the part of "Northwest" was the sole proximate cause of the disaster, sued "Northwest" for the recovery of the damage to its aircraft. Six other suits, in which damages were sought for the deaths of the crew members, were also brought against "Northwest".

"Northwest" then instituted its action in the court below seeking, in effect, a judicial declaration that it was saved from liability to "Alaska" by the exculpatory provision of the contract of January 5, 1959 and that, under the indemnity provision of the contract, "Alaska" was obliged to defend the six death actions and hold "Northwest" harmless from loss on account thereof.

The District Court's judgment, favoring "Alaska", was based on two conclusions, (1) that the terms of the exculpatory or indemnity provision of the "Northwest-Alaska" contract were not sufficiently clear to exonerate "Northwest" from responsibility for its sole negligence if sole negligence should be proved and (2) that the questioned provision of the contract, should it be construed to be so broadly protective as urged by "Northwest", is invalid and unenforceable. We reject the first conclusion of the District Court, and we agree with the second.

Our court has said, in language which bears upon the construction of a contractual provision for indemnity, "* * * general words alone do not necessarily import an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter; it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in clear and un-

equivocal terms." *United States* v. *Wallace,* 18 F. 2d 20 (9th Cir. 1927); see also, *e.g.,* Annot., 175 A. L. R. 8, 30 (1948). To us the agreement in question here seems perfectly clear. Repeating its unequivocal provision, "Alaska agrees to hold harmless and indemnify Northwest, * * * from all claims and liabilities * * * which may now or hereafter arise out of or be in any way connected with the service and facilities furnished to Alaska under this agreement." We see no ambiguity. The language, reasonably construed, undertook to save "Northwest" from loss even should the loss result from the negligence of "Northwest" alone. See *Jackson Terminal Co.* v. *Railway Express Agency, Inc.,* 296 F. 2d 256 (5th Cir. 1961), *cert. denied,* 369 U. S. 860, 8 L. Ed. 2d 18, 82 Sup. Ct. 949 (1962).

It is, of course, ordinarily desirable that competent parties be protected in their rights to make and enforce agreements between themselves. These rights are restricted by the transcendent rule that denies enforceability to a private contractual provision which would require an unlawful act or which, given effect, would gravely violate paramount requirements of public interest. Especially significant here is the decision of our own court in *Air Transport Associates* v. *United States,* 221 F. 2d 467 (9th Cir. 1955). There, the Government, the owner and operator of an Alaskan airport, had granted to an air carrier the right to employ the airport's facilities in exchange for valuable consideration and the execution by the carrier of an agreement undertaking to exculpate the Government for any loss arising from the carrier's operations. Following a nighttime crash of one of the carrier's planes, alleged to have resulted from the Government's negligence in parking a ground vehicle upon an unlighted runway, the carrier

sued, under the Federal Tort Claims Act, to recover for the damage to its aircraft. In defense, the Government invoked the exculpatory provision of the contract. We rejected the defense, holding that under the law of both Washington, where the contract was executed, and Alaska, where the contract was to be performed, the exculpatory provision was invalid. We held that its enforcement would be opposed to the policy interests of the general public. That decision rests upon the controlling fact that the airport was a public enterprise and its operation a public service. In looking to Washington law, we cited *Griffith* v. *Henry Broderick, Inc.*, 27 Wash. 2d 901, 182 P. 2d 18, 175 A. L. R. 1 (1947), and *Broderson* v. *Rainier Nat. Park Co.*, 187 Wash. 399, 60 P. 2d 234 (1936), and we wrote, at page 472,

> "In both of those cases, while the Washington Supreme Court held valid exculpatory agreements, they recognized the general law concerning this type of agreement, and cited with approval the statement of that law found in the American Law Institute, Restatement of Contracts, Volume 2, Section 575(1) as follows:
>
> " ' "A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if * * * (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public for which it has received or been promised compensation.' " [sic]

Appendix B

We referred to a Washington statute, Wash. Rev. Code tit. 14, §14.08.020, which, in effect, declared that the operation of airports is a public function exercised for public purposes. We demonstrated that Alaska, then a territory, had expressly adopted the common law, Alaska Comp. Laws 1949, §2-1-2, and we relied upon a congressional directive to the Administrator of the Civil Aeronautics Board, 49 U.S.C. §1102(b) in concluding, "There can be no doubt that under the law of Alaska the operation of Elmendorf Field was a public enterprise." In the case at bar, the contract not only was to be performed in Alaska, but it was also executed there; hence the question of the validity, *vel non,* of the challenged provision would ordinarily be resolved by the application of Alaskan law. When we decided *Air Transport Associates,* we were not directed to, nor could we find, any pointedly controlling Alaskan decision. The same is true today, so that as we adhere to our former decision, there is no intervening Alaskan determination which is opposed.

"Northwest" vigorously contends that *Air Transport Associates* is not dispositive, reasoning, as we understand its argument, that here, the Administrator's approval of the schedule of charges and the quoted provision therein, incorporated into the "Northwest-Alaska" contract by reference, endowed the contract with a quality of governmental approval which should require us to decide that the whole contract, including the provision in question, was enforceable as promotive and not violative of the public's interest and policy. We cannot accept this argument. The terms of the airport's lease to "Northwest" expressly declare a purpose of public interest and require that "North-

west" offer the facilities for the use of the aeronautical public. It would appear utterly incongruous to hold, as we did in *Air Transport Associates,* that the Government could not, by contract with a user of a government airport, relieve itself from liability for its own negligence and then, here, to hold that the Government may empower its lessee to make an indemnity agreement which might tend to inflict upon the air-traveling public the possibility of tragic consequences flowing from relaxed vigilance in the management of public airport facilities.

We cannot see, as urged by "Northwest", that the entire management and operation of the Shemya airport was so "effectively controlled by pervasive regulatory scheme" as to require us to apply the principle announced in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.,* 360 U. S. 411, 418, 3 L. Ed 2d 1334, 79 Sup. Ct. 1210 (1959). If we were obliged to apply federal law and not Alaskan law, we would be strongly influenced by Supreme Court decisions holding that waterways tugboat towers may not, by contract, exempt themselves from all liability for their own negligence. *E.g.,* see *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.,* 372 U. S. 697, 10 L. Ed. 2d 78, 83 Sup. Ct. 967 (1963); *Bisso* v. *Inland Waterways Corp.,* 349 U. S. 85, 99 L. Ed. 911, 75 Sup Ct. 629 (1955). In *Bisso,* 349 U. S. at 91, we see the Supreme Court's views in the language, "The two main reasons for the creation and application of the rule [to prevent enforcement of release-from-negligence contracts] have been (1) to discourage negligence by making wrongdoers pay damages. * * * The dangers of modern machines make it all the more

necessary that negligence be discouraged."[2] Can it be sincerely believed that the public interest is better served by the discouraging of the negligence of tugboat operators than by the discouraging of negligence on the part of operators of public airports? We think not.

If, in the orderly course of litigation, it is determined that negligence, if any, on the part of "Northwest" was not a proximate cause of the disaster, the indemnity provision may afford an avenue by which it may gain some relief from "Alaska". And it is, of course, not to be implied that "Northwest" is, by this opinion, deprived of any established defenses which Alaskan law affords in actions based upon alleged negligence, nor is it divested of rights or contribution or indemnity which it may have under proper application of general law. We hold only that the exculpatory and indemnity provision, insofar as it is sought to be enforced to spare "Northwest" from liability for its own negligence, being against public policy and invalid, is unenforceable.

Affirmed.

---

[2] The second "main" reason given by the court in *Bisso* was "(2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." The Fifth Circuit, in *Jackson Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256 (5th Cir. 1961), *cert. denied*, 369 U. S. 860, 8 L. Ed. 2d 18, 82 Sup. Ct. 949 (1962) emphasized, in upholding an indemnity agreement, that the contracting parties were not in an unequal bargaining position. If that consideration is critical, it is important to note here that "Northwest", through its agreement with the Government, became a monopolist in the operation of airport facilities on Shemya Island. Its airport was the only airport. It lay beneath a route regularly flown by "Alaska", and "Alaska" was in need of its use for landing and refueling its planes. "Northwest" was in the far stronger position to insist upon the inclusion of its own terms within its contract with "Alaska".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 983

NORTHWEST AIRLINES, INC.,
Petitioner,

—against—

ALASKA AIRLINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1965

No. 983

NORTHWEST AIRLINES, INC.,

Petitioner,

—against—

ALASKA AIRLINES, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinions of the courts below are set forth in the petition at page 1.

Jurisdiction

The jurisdictional requisites are set forth in the petition at page 2.

Questions Presented

1. Should this petition be denied since it was not timely filed?

2. Whether the court below was not correct in holding that the principle of *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411, did not apply, since the Federal Aviation Agency's power to approve Northwest Airlines' schedule of charges did not constitute "effective control by a pervasive regulatory scheme."

3. Even assuming that the principle of *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, is applicable, and even assuming that the Federal Aviation Agency consciously "approved" the exculpatory clause, would not that clause be invalid as a violation of public policy?

Constitution and Statute Involved

Respondent contends that no constitutional provision is involved. The pertinent provision of the statute involved is set forth in the petition at pages 3 and 4.

Statement of Facts

The facts involved are adequately set forth in the petition at pages 4-10.

ARGUMENT

POINT I

This petition should be denied since it was not timely filed.

It appears from the petition (page 2) and page 65 of Volume 1 of the "Transcript of Record" in this Court that the Court of Appeals for the Ninth Circuit denied rehearing on November 3, 1965. Under Title 28, § 2101 of the United States Code and Rule 34 of the Rules of this Court, therefore, the petition was required to be filed on or before February 1, 1966, unless, prior to the expiration of that period, a Justice of this Court extended the time in which to file the petition.

No application for extension of time within which to file the petition was made on or before February 1st.

Petitioner did file an application for extension of time dated February 3rd, ingeniously avoiding Rule 34's prohibition of the Clerk's receiving any such petition after the expiration of the period by presenting the application not to the Clerk, but to Mr. Justice Brennan. Mr. Justice Brennan thereupon signed an order extending petitioner's time to file to February 15th, but "* * * without prejudice to this Court's consideration of whether this application was filed in time."

It is respectfully suggested that the clear prohibition of Rule 34 cannot be evaded by the ingenious method employed by the petitioner here. If a petitioner can evade it simply by circumventing the Clerk's office, then Rule 34 has no practical meaning whatever.

Moreover, the petitioner's arguments are hardly entirely frank. Petitioner says that the delay in filing was due to an Act of God, and not to excusable or inexcusable neglect. However, it appears from the affidavit of Richard Franks, sworn to on February 3, 1966, in Essex County, New Jersey, accompanying the application, that the petition was mailed from New York on the afternoon of January 31st, the day before the expiration of the period, by Fourth Class mail, Special Delivery. Although in the ordinary course of events First Class mail from New York to Washington will be delivered the day after mailing, we have been advised by the New York Post Office that Fourth Class mail from New York to Washington requires from one to three days. Therefore, even if there had been no unusual delays in the mails, petitioner had no assurance that the petition would be delivered in time. Clearly, it was negligent in not having the petition delivered personally on February 1st or at least requiring that the petition be sent by First Class mail on January 31st. The additional cost of mailing First Class rather than Fourth Class is relatively insignificant. The petitioner might also have inquired of the Clerk's office on the morning of February 1st (as in fact it did on February 3rd) and, upon being advised that the petition had not been received, could have delivered it personally later that

day. Yet, the application makes it clear that no such inquiry was made until two days after the period had expired. There can be no serious denial that this, too, constituted neglect.

The snowstorm, upon which petitioner relies as an "Act of God" only made the petitioner's neglect more flagrant. The snowstorm actually commenced on Saturday, January 29th, and by Sunday evening there were obviously serious delays and cancellations of transportation into and out of Washington. These delays continued through Monday morning, January 31st. These delays were reported on the front pages of New York newspapers on Monday morning. At that time the petition had not yet been mailed. Surely the petitioner was then on notice that it must take positive measures to insure that the petition would be delivered on time. And it could have taken any one of the following measures: It could have insured that the petition was mailed by First Class mail. It could have arranged for personal delivery. It could have inquired of the Clerk's office on the morning of February 1st. And finally, it could have applied to the Court under Rule 34 (before February 1st) for a short extension of time in view of the by then plain likelihood of transportation delays. Any one of these simple and obvious precautions would have eliminated the possibility of late filing, but the petitioner took none of them. It cannot now seriously claim that it was not guilty of even excusable neglect. It was certainly guilty of neglect, and, under the circumstances, of inexcusable neglect. The petition should be denied as untimely filed.

POINT II

No conflict exists between the decision of the Court of Appeals and the decision of this Court in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411.

The petitioner's sole argument for review of the decision of the Court of Appeals for the Ninth Circuit by this Court is that " . . . the unexplained conclusions of the Court below conflict in principle with the rationale of *Southwestern* [*Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, (1959) 360 U. S. 411] and confuse the precedential effect of that case" (Petition, p. 11). All of the petitioner's other arguments proceed from the assumption that such a conflict exists.

Whether a conflict "in principle" is sufficient to move this Court to grant certiorari is questionable; but in any event it is clear that the conclusions of the Court of Appeals with respect to *Southwestern* were not "unexplained," nor is there any conflict, in principle or otherwise, between the Court of Appeals' decision on the specific facts of this case and what was held by this Court in *Southwestern*.

In *Southwestern* the respondent, a water carrier certificated under the Interstate Commerce Act, had filed certain tariffs containing an exculpatory clause[1] with the Interstate Commerce Commission. That

[1] The words "exculpatory clause" are used in this brief to refer both to the exculpatory clause and to the indemnification agreement.

clause was incorporated by reference in a bill of lading issued by the respondent to the petitioner. The petitioner sued to recover damages for the loss of its barge, which had been towed by the respondent. The respondent pleaded the exculpatory clause as a complete defense. The petitioner argued that under the decision of this Court in *Bisso* v. *Inland Waterways Corporation,* 349 U. S. 85 (1955), the exculpatory clause was invalid as against public policy.

In *Southwestern* the Court noted that there was a factor in that case not present in *Bisso*: that the towboat's rates were " . . . at all times subject to regulatory control, prospectively and by way of reparation" by the Interstate Commerce Commission; and that the Commission, in setting the rates, may have compensated for the risk-shifting effect of the exculpatory clause. The Court therefore directed that the parties be given time in which to permit the Interstate Commerce Commission to indicate whether this rather intricate factor was considered in the establishment of the tariff there in question, pointing out, however, that the ultimate question of validity remained with the Court (360 U. S. at 420).

The specific question presented in *Southwestern* was " . . . whether considerations of public policy . . . are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body," (360 U. S. at 417), and this Court noted that "The rule of *Bisso,* however applicable where the towboat owner has 'the power to drive hard bargains,' may well call for modification when that power is effectively controlled by a pervasive regulatory scheme" (360 U. S. at 418).

The *rationale* of *Southwestern,* therefore, is that where a regulatory body is charged with, and has the expertise to exercise, control over the rates charged by a carrier subject to its jurisdiction so as to preclude the power to drive hard bargains, it may well feel, in the exercise of that function, that economic factors may justify an exculpatory clause, and override otherwise valid considerations of public policy vis-a-vis hard bargaining.

The essential difference between this case and *Southwestern* is that in this case there was no tariff filed with the Interstate Commerce Commission or with any other regulatory body as such. There was no "expert administrative body" charged with control over the rates charged by the petitioner here. There was, in fact, no expertise available, as there was in *Southwestern,* to consider all the economic factors which might justify an exculpatory clause. The F.A.A., unlike the I.C.C., acted solely as a landlord, and not as a regulatory body. As the District Court found (F.F. #39) and as the Court of Appeals specifically pointed out (351 F. 2d at 257), the schedule of rates for Shemya Airport was not "effectively controlled by pervasive regulatory scheme."

This conclusion is amply justified both by the statutes involved and by the record below.

The statutory language which Northwest contends establishes a "pervasive regulatory scheme" by which the economic impact of an exculpatory agreement could be evaluated is found in 49 U.S.C.A. § 1159 (a), quoted at page 3 of the petition. That language should be compared with the language of the statutes

which set forth the functions, duties and powers of the Interstate Commerce Commission, relating to carriers by water *only,* as set forth by this Court in footnote 7 to its *Southwestern* opinion.

There, this Court first indicated the *scope* of the Commission's regulatory power in this area by citing 49 U.S.C.A. § 902 (d), where "common carrier by water" is defined. It may be seen that the scope of regulation contemplated by the section and hence by this Court is extremely broad.

The Court then indicates the *depth* or *extent* of the regulation by citing portions of Sections 906 and 907 of Title 49.

It easily may be seen that in *Southwestern* this Court had before it a regulatory arrangement which went to virtually the entire interstate towing industry and which was empowered to examine the economic impact of its decisions in great depth. The distinction between that "pervasive regulatory scheme" and the functions of the F.A.A. with regard to the Shemya Airport rates is very readily apparent. The language of 49 U.S.C.A. § 1159 (a) simply was never intended to create a "pervasive regulatory scheme."

In that regard, the attention of this Court is respectfully directed to the legislative history of the International Aviation Facilities Act, 49 U.S.C.A. §§ 1151 et seq., where it is stated that:

> "It should be pointed out that this legislation relates only to the acquisition and managing of airports, airways and associated services by the Administrator or the Chief of the Weather

Bureau" U.S. Code Congressional Service, 80th Congress, 2d Session, 1948, at page 1809.

It is difficult to discern any intent to create "regulatory" power over landing fees in such language. The Administrator has the power to contract, as he did, but not to "regulate" in the sense in which the term was used by this Court in *Southwestern.* The evidence adduced at the trial from former F.A.A. employees vividly demonstrates that the F.A.A. had no rate-regulating capability, and that specifically in the case of Shemya Airport it in fact performed no such function.

James D. Hill, who from 1959 to 1962 was associate general counsel of the F.A.A. and who from April, 1962, through October, 1963, served as Deputy General Counsel of the F.A.A., testified as follows:

> "Q. Now I think you mentioned that there were approximately 46,000 people employed by F.A.A. A. Yes.
>
> Q. Can you tell me approximately how many of these people are involved in the regulation, the economic regulation of either rates or routes and things of that sort? A. None. That is not a function of the Agency." (Tr. 17)
>
> * * * *
>
> "Q. Can you tell me approximately how many airports there are in the United States? A. Over 8,000.
>
> Q. Can you tell me how many of these airports have their tariffs or their rates, their landing fees, schedules of charges, what have you, regulated by the F.A.A.? A. Only those which

the Agency owns itself, in which it acts as a proprietor. That would be Washington National Airport, Dulles International Airport, and Cold Bay, Alaska.

Q. Aside from those does the F.A.A. regulate the charges at any airports? A. No. It has no authority to do that. It does not do that, it has never done that." (Tr. 20, 21)

* * * *

"Q. I think you mentioned that in certain instances the F.A.A. had set rates for its own airports, is that correct? A. Yes, sir.

Q. Does the F.A.A. have within its organization a branch which is devoted to the economic study of these rates? A. No, sir.

Q. Is there any provision within the F.A.A. for an economist or for any great specialist, any tariff specialist of any kind to look at these rates? A. No, sir. That is not one of the functions of the Agency so it has no rate-making section. Although of course I don't know all of the 46,000 employees. I have never met a rate-making specialist in the Agency." (Tr. 38)

Chris Lample, a civil and electrical engineer, was employed by the F.A.A and its predecessor agencies for more than 35 years. Between the years 1953 and 1963 he served as Assistant Director of Facilities and Materiel. He personally handled the leasing of Shemya to Northwest. Throughout the period relevant to this case, most of the recommendations to the Administrator of the F.A.A. which related to airports in Alaska came from Mr. Lample (Tr. 52). He testified, in part:

"Q. Do you, Mr. Lample, have any training or background in economics or economic regulation in the sense of rate-making or tariff regulations? A. Tariff regulation. None whatever.

Q. Do you consider yourself to be in a position to evaluate the economic impact of an indemnity provision?

Mr. Boochever: I am again going to object. I don't see that what he considers himself to be has any bearing on this case at all. His personal opinion as to whether he can evaluate an indemnity provision seems to me is calling for an opinion of the witness as to his own abilities.

Mr. Bradley: I think if the witness answers yes, you may be right, Mr. Boochever, but if he answers no it may be quite meaningful.

The Court: I will overrule the objection.

By Mr. Bradley:

Q. Do you consider yourself to be in a position to evaluate the economic impact of an indemnity provision, sir? A. No." (Tr. 49, 50)

* * * *

"Q. Do you recall reviewing a schedule of charges for Shemya Airfield? A. Yes.

Q. Was this schedule of charges that you reviewed—let me ask you first, how many schedules of charges did you review? A. There was an original, and a request for an increase, and a request for a second increase. Three.

Q. You reviewed three. Now we recognize that it was a long time ago and that it's difficult to recall specifics, but can you tell me whether the

procedures that were followed, what happened with regard to these reviews, was approximately the same with regard to all three, or were there substantially different procedures followed with regard to each? A. It was the same, the same method of procedure.

Q. From whom did you receive the schedules of charges? A. These came from the Regional Administrator in Anchorage.

Q. Is what you are saying true in each case? A. Yes.

Q. To whom did these first come for review in Washington? A. To me.

Q. Did you recommend approval of the schedules of charges? A. Yes, sir.

Mr. Boochever: Excuse me. I am going to object. Whether a subordinate recommends or does not recommend is not relevant. It's the action of the Department that counts. And I move the answer be stricken.

The Court: Overruled.

By Mr. Bradley:

Q. Now to the best of your knowledge did anyone other than yourself review the schedules of charges before they went to the Administrator? A. No.

Q. In recommending approval of the schedule of charges for Shemya, in each case, did you take into account the economic effect of any indemnity provisions? A. No. I had no knowledge of this at all.

Q. When you recommended approval or at the time you deliberated, did you take into considera-

tion the possibility that as a result of an indemnity provision danger to people on aircraft might result? A. No. That didn't occur to me at all. That wouldn't have come into the picture at all as far as I was concerned." (Tr. 52-54)

The conclusion that the F.A.A.'s "approval" of Shemya rates was the act of a landlord exercising a reserved right to approve rates charged by its tenant, and not part of any "pervasive regulatory scheme," is inescapable.

POINT III

Even if the rule of the *Southwestern* case should be held to be applicable to the facts of this case, the Court below was correct in holding the clause to be invalid and unenforceable.

Even if it is assumed that the Federal Aviation Agency, under the circumstances of this particular case, was empowered to, and did, exercise such complete regulatory control over the charges to be made by Northwest Airlines for the use of Shemya Airport that the case falls within the *Southwestern* doctrine, and if it is further assumed that the F.A.A. "approved" the schedule of charges after having taken into consideration the exculpatory clause and economic factors which might make the inclusion of that clause "reasonable," it most certainly does not follow that the Court of Appeals erred in declaring it invalid nevertheless.

We start with the proposition that, as this Court

itself pointed out in *Southwestern Sugar Co.* v. *River Terminals Corp.*, (1959) 360 U. S. 411, 420:

> "We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution."

We also know that this Court has specifically approved a "judicial rule" invalidating exculpatory clauses where such clauses would have a tendency to encourage negligence on the part of the exculpatee, or where one of the parties is in a position to drive a hard bargain. *Bisso* v. *Inland Waterways Corp.* (1955) 349 U. S. 85; *Boston Metals Co.* v. *The Winding Gulf*, (1955) 349 U. S. 122; *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, (1963) 372 U. S. 697. In the *Bisso* case, this Court noted that (349 U. S. at 91):

> ". . . The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."

The second of these "two main reasons" was held not necessarily applicable in *Southwestern*, because ". . . so long as the towboat's rates are at all times subject to regulatory control, prospectively and by way of reparation, the possibility of an overreaching . . . can be aborted by the action of the I.C.C." (360 U. S. at 418).

We have already noted under Point II that in this case the F.A.A. had no power of "regulatory control, prospectively and by way of reparation," to prevent overreaching, or, if it did, that it had no means of exercising that power and, in fact, did not even consider the economic effect of the exculpatory clause.

The other "main reason" for the *Bisso* rule—"to discourage negligence by making wrongdoers pay damages"— was not discussed at any great length in *Southwestern.* However, it is difficult to imagine an operation which would justify the maintenance of a high standard of care more than an aircraft landing field.

Justice Black, speaking for a majority of the court, said in *Bisso*:

> "The dangers of modern machines make it all the more necessary that negligence be discouraged." *Bisso* v. *Inland Waterways Corp.,* 349 U. S. at 91.

With only one person in a slow-moving aircraft, the argument for a properly maintained landing field is strong. With present day aircraft carrying literally hundreds of persons at speeds nearly equal to the speed of sound, the argument for airport care becomes very nearly overwhelming.

In this case, Northwest was in complete and unquestioned control of the situation, as far as landing facilities were concerned; Alaska had no control whatever. If the exculpatory clause is valid, Northwest has no incentive whatever even to take reasonable pre-

cautions with respect to the safety of its field for aircraft using its facilities.

Suppose that Northwest's employees negligently parked a gasoline truck on a runway and negligently failed to remove it or to illuminate it, before dark, even though they knew that an airplane was scheduled to land on that runway. Suppose, further, that, as a result, the airplane crashed into the truck, and the truck, the airplane, and everybody and everything on board were consumed by fire: If the exculpatory provision is valid, Northwest could view the situation with equanimity, knowing that the airplane operator would not only have to reimburse it for the loss of the truck, and to bear the loss of its own airplane, but also would have to hold Northwest harmless from the claims presented by the deceased passengers' representatives, by the owners of the cargo, and by the owners of any property destroyed on the ground.

Even if, viewed from a strictly economic viewpoint, the exculpatory clause was justifiable—and there is no evidence that any such view was taken—it seems abundantly clear that public policy could not conceivably countenance such a result. As the Court of Appeals asked, and as it answered its own question (351 F. 2d at 257-8):

> "... Can it be sincerely believed that the public interest is better served by the discouraging of the negligence of tugboat operators than by the discouraging of negligence on the part of operators of public airports? We think not."

Therefore, even if this case comes within the *Southwestern* rule, and even if this Court were to give deference to the F.A.A.'s "approval" of the schedule of charges and the exculpatory clause as a purely economic matter, there can be no question that in the circumstances of this case public interest in safety is entitled to a higher consideration; and the decision below, invalidating the exculpatory clause, was correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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